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Sprint: SBC-Oklahoma

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application of SBC Communications, Inc.	)	CC Docket No. 97-121
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	
Provide In-Region InterLATA	)	
Services in Oklahoma	)	

REPLY

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May 27, 1997

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REPLY

Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby submits the following reply in support of its petition to deny the above-captioned application of SBC Communications, Inc. ("SBC").

Sprint and other commenters have already detailed many of the reasons why SBC's application must be denied. Rather than reiterate those points, Sprint files these reply comments for the limited purpose of comparing the differing roles and conclusions of the United States Department of Justice and the Oklahoma Corporation Commission ("OCC"). Sprint also addresses the legal relevance of two related proceedings, specifically the Eighth

Circuit appellate review of the FCC's Interconnection Order[1] under Sections 251-253 of the Act and the FCC's recent Universal Service Order.[2]

I. A REVIEW OF BOTH THE OKLAHOMA CORPORATION COMMISSION'S COMMENTS AND THE EVALUATION OF THE U.S. ATTORNEY GENERAL SHOWS THAT THERE IS NO CREDIBLE SUPPORT FOR SBC'S APPLICATION.

Congress entrusted this Commission with the exclusive power to grant or deny BOC applications filed under Section 271 of the Communications Act.[3] Section 271(d)(2) requires the Commission to "consult" with the Attorney General and with the relevant state commission.[4] Those two consultations differ fundamentally both in scope and in weight.

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1 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Report and Order*, CC Dkt. No. 96-98, 11 FCC Rcd 15499 (1996).

2 Federal-State Joint Board on Universal Service, *Report and Order*, CC Dkt. No. 96-45 (rel. May 8, 1997).

3 See 47 U.S.C § 271(d)(3) (granting authority to the FCC to approve or deny BOC's Section 271 applications).

4 Although Section 271 calls for consultation with the "state commission," it is far from clear that the State of Oklahoma has actually consulted favorably on SBC's application here. The Comments of the Oklahoma Attorney General note that the "Oklahoma Attorney General is the only state entity that is statutorily authorized and obligated to represent the collective interests of all Oklahoma consumers of regulated telecommunications services in any 'state or federal judicial or administrative proceeding.'" See Oklahoma Attorney General Comments at 2 (April 28, 1997). A substantial legal question exists as to the scope of the OCC's authority in this proceeding, since Congress presumptively did not intend to disturb the states' prerogative to order their own governmental affairs as they see fit.

This question is hardly academic given the fact that the State Attorney General -- in contrast to the OCC -- found that SBC did not comply with Section 271. Given the differences between the two Oklahoma governmental parties, the official views of the State of Oklahoma on SBC's application remain unclear.

Section 271(d)(2)(A) sets forth the generous consultative role granted the Attorney General; the Department of Justice is empowered to evaluate the BOC's entire application "using any standard the Attorney General considers appropriate." The importance of the Attorney General's evaluation is highlighted by the Commission's statutory obligation to give "substantial weight" to the evaluation.

The Department of Justice has unequivocally stated on the record that SBC entry into interLATA services in Oklahoma at this time would be anticompetitive. See Evaluation of the Department of Justice (filed May 16, 1997) (*passim*). Sprint believes that the Justice Department's findings here necessarily require the Commission to find the application contrary to the public interest: once the prospect of entry is persuasively shown to be anticompetitive, the public interest can hardly be said to be served. Stated otherwise, DOJ's positive evaluation of a 271 application is a necessary (though not sufficient) condition for FCC approval under Section 271.

The State PUC's consultative role, in contrast, is more narrow. The specific task set out for the states is one of factfinding. In contrast to the Justice Department's "evaluation" of the BOC's entire application, Section 271(d)(2)(B) makes plain that the State PUC consultation is for the purpose of assisting the Commission in order to "verify the compliance of the [BOC] with the requirements of subsection (c)." Thus, pursuant to the statute, the state consultation is fact-based, that is, to make findings of fact as to whether there are facilities-based competitors, whether such competitors serve both residential and commercial customers, whether the services are provided at least predominantly over the competitor's own network, and whether each element of the checklist has been satisfied.

Given the inherently factual nature of these questions, sound legal process would strongly suggest the use of evidentiary hearings to develop credible, tested findings of fact.[5] Both the Justice Department and the Commission in fact jointly wrote to the OCC to urge it to utilize "full evidentiary hearing[s]" in determining whether SBC complied with Section 271.[6] As articulated by Chairman Hundt, the state role lies in factfinding:

> At the FCC we are looking for the states to give us a full understanding of what's happening in the relevant markets in each state. We are hoping for a record from the states on all entry-related issues that is replete with assertions by all parties, rebuttals if any, well supported findings of fact, and any and all conclusions the states wish to provide.[7]
>
> [E]ach state's knowledge of local conditions and experience in resolving factual disputes enables it to play the vital role of fact-finder in the 271 process. States should become like to special masters in court proceedings: the states make findings of fact on the disputed issues relating to the opening of the relevant BOC's local network, and we can, if we choose, rely on those findings of fact. A credible state fact-finding process, in which opponents have ample opportunity to challenge directly Bell company claims of network opening, will be useful to a Bell in carrying its burden of proof before the FCC on any disputed facts. The quality of the record compiled by each state commission may be more important than the vote that commission casts.[8]

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5 The common meaning of the word "verify" is "to prove to be true by demonstration, evidence, or testimony; to confirm; to establish the proof of." Webster's New Twentieth Century Dictionary Unabridged (2d ed).

6 See OCC Staff Application For Initiation of OCC 271 Proceeding, PUD 970000064 at 2 (Feb. 6, 1997)(attached in Vol. IV, Tab 1 to SBC's Application).

7 Statement of Reed E. Hundt, Chairman, Federal Communications Commission, on Implementation of the Telecommunications Act of 1996 before the Subcommittee on Telecommunications and Finance, Commerce Committee, U.S. House of Reps. (July 18, 1996) at 18-19.

8 See Speech of Chairman Reed E. Hundt, "Access Reform and Universal Service: Into the Thick of It," before NARUC Communications Committee (Feb. 25, 1997) at 9; see also Speech of Chairman Reed E. Hundt, before the Competition Policy Institute (Jan. 14, 1997) at 7 (same).

Thus, the states sit as special masters do, to develop credible records upon which reasoned decisions can be made. In order for state commissions to fulfill this role, full adjudicative-type proceedings should be held. This would include, at a minimum, a right to discovery against other parties, a right to submit evidence and testimony, a right to cross-examine other parties' witnesses, and findings made on record evidence. See generally, APA §§ 554-555.

These procedures were not deployed in Oklahoma. The OCC in fact expressly declined to conduct full evidentiary proceedings.[9] The OCC characterized its proceeding as "more in the nature of a Notice of Inquiry" for which "the application of strict evidentiary rules is not appropriate."[10] Chairman Graves explained several times that the OCC's conclusions that SBC satisfied Section 271 were *policy* decisions which did not necessitate evidentiary processes.[11]

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9 See OCC Hearing Transcript at 9; Comments of the OCC in CC Docket No. 97-121, Appendix B at 3 (filed April 30, 1997)("OCC Comments")(dissent of Commissioner Anthony). Commissioner Anthony felt that the failure to hold such hearings would cause the FCC to have "great concerns about the procedural and evidentiary quality of our state commission proceeding in this matter." See OCC Comments, Appendix B at 3.

10 OCC Final Order, PUD 970000064 at 2 (Apr. 30, 1997)(attached as appendix C to the OCC's Comments). See also OCC Comments at 4 ("The OCC determined that its investigation is more in the nature of a Notice of Inquiry and that its report to the FCC need not be based on strict rules of evidence.").

11 See, e.g., OCC Hearing Transcript at 12 ("the issue [for the OCC] is what's the general policy of the State of Oklahoma"); Id. at 26 ("we have made a policy decision" whether or not a checklist item has "been offered"); Id. at 13 ("these are fundamental policy, broad policy questions that affect markets"). Commissioner Apple, who provided the decisive second vote in SBC's favor, agreed with Chairman

It is significant that the OCC deviated from its "customary procedures regarding appeal hearings" and "about items allowed into the record."[12] Most notable was the fact that the OCC allowed SBC to submit comments without giving testimony or making its witnesses available for cross-examination even though SBC was allowed to cross-examine the witnesses of other parties.[13]

The OCC's opinion that SBC has met Track A and the competitive checklist is unsurprisingly based not on findings of fact but rather on a strained legal construct about Section 271. In order to conclude that SBC is "providing" interconnection and access in compliance with the Section 271 checklist, the OCC, like SBC, erroneously equates the term "providing" with the term "offering."[14] Indeed, the OCC recognized specifically that all fourteen elements of the checklist were not being utilized by CLECs but found nevertheless that the checklist had been met because "all of the checklist items are offered by [SBC]."[15]

Graves, ("I don't think it's [the OCC's job here to be] adjudicatory, I think its merely a pass through."). Id. at 36.

12 See OCC Comments, Appendix B at 3 (dissent of Commissioner Anthony). See also OCC Hearing Transcript at 10-11 (noting deviations from the OCC's customary rules).

13 See id. See also Oklahoma Attorney General Comments at 3 n.2.

14 See OCC Comments at 4-8 (characterizing Brooks Fiber's tariff as meeting the "providing" element of Track A and stating that SBC's SGAT showed that SBC's general offering satisfied the provision requirement of the checklist).

15 See OCC Comments at 8. Chairman Graves, in fact, candidly admitted that he did not believe SBC was physically providing the fourteen elements of the checklist at the time that he voted to tell the Commission that it was. See OCC Hearing Transcript at 29 (Under the checklist, is SBC to provide services? "Yes. Have they physically got to that point today? No. Do we wait and make Bell file one every month as these things

The OCC's comments on the public interest (which in any event fall outside of Section 271(d)(2)(B)'s consultative role for State PUCs)[16] openly reflect a disagreement with Congress' fundamental policy judgment in Section 271. The OCC expressly disavowed the view that the "carrot" of interLATA entry provides the necessary incentive for SBC to cooperate in opening up the local exchange market in Oklahoma. In marked contrast to the enacting Congress, the OCC believes that regulatory oversight will alone assure that SBC will negotiate with CLECs in good faith.[17] Its comments in support of SBC's application plainly derive from this policy judgment -- one that is fundamentally at odds with the 1996 Act.

II. THE COMMISSION MAY IMPOSE ITS SECTION 271 REQUIREMENTS REGARDLESS OF RELATED PROCEEDINGS.

At least two other substantial proceedings overhang the issues raised in this Section 271 application proceeding; both raise questions as to whether the FCC's decisionmaking authority under Section 271 can or should proceed independently. Sprint urges the Commission to proceed under Section 271 with distinct analyses tied to the special objectives of this section.

In Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. Oct. 15, 1996), the Eighth Circuit stayed the Commission from enforcing the pricing provisions and pick and choose rules contained in its Interconnection Order[18] pending the court's final resolution on challenges to

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get a little closer to being done or can we reasonably presume that . . . they have met the general terms of the statutory provisions.")

16 The OCC acknowledged that it was "not specifically required" to comment on the public interest aspects of SBC's application. See OCC Comments at 3.

17 See id. at 10.

18 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Report and Order*, CC Dkt. No. 96-98, 11 FCC Rcd 15499 (1996).

the interconnection rules in their entirety. At this time, it is not known whether, or to what extent, the Commission will prevail with respect to its interconnection requirements. The Interconnection Order, properly in Sprint's view, made a series of expert findings as to what conditions will be necessary or appropriate to encourage efficient entry into local telephone competition, such as unbundled network elements priced on TELRIC, most-favored nation obligations on an issue-by-issue basis, specified resale obligations, etc. Regardless of the Eighth Circuit's ultimate conclusions on the full reach of the FCC's jurisdiction under Sections 251 through 253 to impose these requirements, the underlying policy reasoning of the Interconnection Order holds for purposes of Section 271. Moreover, Section 271 provides the Commission with distinct and independent authority to set these rules of entry. That these FCC rules may also have the effect of governing intrastate telecommunications traffic in Bell Company territory will not defeat the FCC's jurisdiction under Section 271.

Secondly, the Commission's recent decision in the Universal Service proceeding[19] addressed the issue of which carriers may be eligible for universal service funds under Section 214(e) and Section 254. Specifically, the FCC found that the requirement that an eligible carrier have "its own facilities" could be satisfied by the use of unbundled network elements, rather than independent facilities. The FCC reasoned that to construe this language otherwise would be to defeat the purpose of the provision, i.e., to promote new entry by minimizing incumbent advantages.[20]

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19 Federal-State Joint Board on Universal Service, *Report and Order*, CC Dkt. No. 96-45, (rel. May 8, 1997).

20 Id. at ¶ 153.

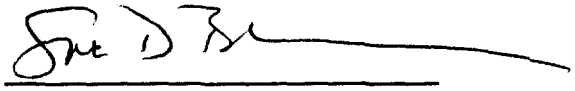
Whatever the correctness of that interpretation under Section 214(e), it should not be carried over here for purposes of construing Section 271's requirement that a competitive local exchange carrier offer services exclusively or predominantly over its own facilities. As Sprint and others have shown, the requirement under Section 271 for a competing carrier with "its own facilities" means that independent facilities constructed in competition with the BOC must be in operation and the mere leasing of unbundled elements alone will not suffice here. Without reiterating the full textual and policy analysis that requires this conclusion, Sprint notes simply that the canons of statutory construction permit -- indeed require -- that Congress' objectives be adhered to in interpreting the words of the statute. See Comite Pro Rescate v. Sewer Auth., 888 F.2d 180, 186-87 (1st Cir. 1989) (where *Chevron* deference applies to agency's task of resolving interstitial legal issues, "it does not seem odd to find the agency interpreting the same words somewhat differently as they apply to different parts of the statute, in order better to permit that statute to fulfill its basic congressionally determined purposes")(opinion by Breyer, J.), cert. denied, 494 U.S. 1029 (1990); Weaver v. USIA, 87 F.3d 1429, 1437 (D.C. Cir. 1996) (noting general rule of *in pari materia* is defeasible where appropriate to fulfill Congress' intent); Common Cause v. FEC, 842 F.2d 436, 441-42 (D.C. Cir. 1988) (in analyzing different applications of the *in pari materia* rule, both majority and dissenting opinions decline to apply it where to do so would defeat congressional intent) (dissent by Ginsburg, J.R.B.).

CONCLUSION

For the foregoing reasons, SBC's application must be denied.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.



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May 27, 1997

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